

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CRESTDALE ASSOCIATES, LTD.,

Plaintiff,

v.

EVEREST INDEMNITY INSURANCE
COMPANY,

Defendant.

Case No. 2:09-cv-02439-LDG-GWF

ORDER

The plaintiff, Crestdale Associates, Ltd., brought this suit against Everest Indemnity Insurance Company, asserting that Everest improperly retained advanced premiums paid, and unfairly computed premiums owed, on several Commercial General Liability policies. The parties filed cross-motions for Partial Summary Judgment (## 20, 34) as to claims concerning one of those policies. The Court will grant Everest's Motion for Summary Judgment and deny Crestdale's Countermotion.

I. Background

Crestdale is a business engaged in developing residential areas. Everest is an insurance company with its principal place of business in New Jersey. This is a dispute over insurance

1 premiums for Commercial General Liability insurance covering Crestdale's construction of
 2 single-family homes in several Clark County developments. Crestdale purchased three insurance
 3 policies from Everest: the "Hacienda Park" policy; the "Tudor Park" policy; and the "Village
 4 South" policy. Pursuant to provisions in the policies, an advance premium was calculated for each
 5 policy based upon the anticipated receipts from the sales of homes. Each of the policies contained
 6 an endorsement specifically relating to the calculation of the insurance premiums. The
 7 endorsement provides in part:

8 The premium(s) due for this policy shall be calculated in accordance with the
 9 following:

- 10 1. The minimum earned premium shall be fully earned at the inception of the
 11 policy and is the greater of:
 a. (25%) Twenty-five percent of the amount entered as advance
 12 premium in the schedule; or
 b. The dollar amount shown in the schedule as the minimum premium.
 13 There will be no return of any portion of the minimum earned
 premium in the event of cancellation of the policy.

14 This endorsement also provides as follows:

- 15 2. In Section IV, Commercial General Liability Conditions, Item Premium
 16 Audit Part B. is deleted and replaced by:

17 The premium entered in the schedule as advance premium is
 18 a provisional premium only and is subject to adjustment in
 19 accordance with the audit provisions of this policy. Premium
 20 adjustments effected as a result of premium audits will be
 21 done after the policy is no longer in effect but may be done
 22 by us when a policy is in effect. Premium audit adjustment
 23 calculations will be made to determine additional premiums
 24 only. There will be no downward adjustments of the advance
 premium resulting from the premium audit provisions of this
 policy. The advance premium is fully earned after the date
 shown in the schedule as the fully earned premium date. If
 there is no date shown in the schedule, the fully earned
 premium date will be 12 months after the inception of the
 policy. There will be no return of any portion of the advance
 premium in the event of cancellation of the policy after this
 date.

25 The endorsement further provides:
 26

- 1 3. The advance premium is determined according to the basis of premium,
2 estimated exposure and composite rate shown in the schedule. The final
3 premium will be determined by audit based on the actual exposure. Any
4 audit premiums are due and payable on notice to the first named insured.

5 Crestdale purchased the policies during the height of residential construction in Clark
6 County. While the policies were in effect, the residential housing market substantially declined.
7 Consequently, Crestdale changed its plans with respect to the development of some of the
8 property. Ultimately, it did not build any homes in Hacienda Park and in early 2006 sold all 142
9 lots to Pulte Homes. At about the same time, Crestdale also sold 66 remaining lots in its Tudor
10 Park development to Pulte Homes. Accordingly, Crestdale seeks to recoup the costs of some of the
11 insurance it purchased.

12 Crestdale's complaint contains several causes of action. The first seeks declaratory relief
13 with respect to the specific obligations of the parties under the three policies. The second is for
14 unjust enrichment with respect to the premium paid for the Hacienda Park policy. The third and
15 fourth assert claims for breach of the implied covenant of good faith and fair dealing.

16 The parties' present cross-motions concern the Hacienda Park policy, which was to be in
17 effect from April 20, 2004, to April 20, 2007. The minimum premium and advance premium for
18 the Hacienda Park policy were the same amount: \$277,000. The policy further provided that the
19 advanced premium was fully earned on April 20, 2005. Crestdale canceled the policy effective
20 April 1, 2006, a date subsequent to the date on which the advanced premium became fully earned.

21 Everest's motion seeks partial summary judgment with respect to whether Everest is
22 entitled to retain the advance premium it received for the Hacienda Park policy and whether the
23 necessary risk attached to the policy. Everest also seeks summary judgment with respect to
24 Crestdale's unjust enrichment claim, contending that the cause of action does not exist where there
25 is a valid and enforceable contract. Crestdale denies that a valid contract formed, claiming that the
26 necessary risk did not attach to the policy. Everest also seeks summary judgment with respect to
27 Crestdale's causes of action for breach of implied covenant of good faith and fair dealing and

1 tortious breach of the implied covenant of good faith and fair dealing, arguing that, as a matter of
2 law, no such causes of action exist in insurance premium disputes. Crestdale disagrees.

3 4 **II. Standard for Summary Judgment**

5 In considering a motion for summary judgment, the court performs “the threshold inquiry
6 of determining whether there is the need for a trial—whether, in other words, there are any genuine
7 factual issues that properly can be resolved only by a finder of fact because they may reasonably be
8 resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To
9 succeed on a motion for summary judgment, the moving party must show (1) the lack of a genuine
10 issue of any material fact, and (2) that the court may grant judgment as a matter of law. Fed. R.
11 Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one
12 required to prove a basic element of a claim. *Anderson*, 477 U.S. at 248. The failure to show a fact
13 essential to one element, however, “necessarily renders all other facts immaterial.” *Celotex*, 477
14 U.S. at 323.

15 “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after
16 adequate time for discovery and upon motion, against a party who fails to make a showing
17 sufficient to establish the existence of an element essential to that party’s case, and on which that
18 party will bear the burden of proof at trial.” *Id.* “Of course, a party seeking summary judgment
19 always bears the initial responsibility of informing the district court of the basis for its motion, and
20 identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and
21 admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence
22 of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323. As such, when the non-moving party
23 bears the initial burden of proving, at trial, the claim or defense that the motion for summary
24 judgment places in issue, the moving party can meet its initial burden on summary judgment “by
25 ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support
26 the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. Conversely, when the burden of proof at

1 trial rests on the party moving for summary judgment, then in moving for summary judgment the
2 party must establish each element of its case.

3 Once the moving party meets its initial burden on summary judgment, the non-moving
4 party must submit facts showing a genuine issue of material fact. Fed. R. Civ. Pro. 56(e). As
5 summary judgment allows a court “to isolate and dispose of factually unsupported claims or
6 defenses,” *Celotex*, 477 U.S. at 323-24, the court construes the evidence before it “in the light
7 most favorable to the opposing party.” *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).
8 The allegations or denials of a pleading, however, will not defeat a well-founded motion. Fed. R.
9 Civ. Pro. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).
10 Where there is no issue of fact to be determined, and the only issue to be determined is the
11 application of the undisputed facts to the subject insurance policy, the interpretation of the policy
12 is a question of law. *Washoe Cnty v. Transcontinental Ins. Co.* 110 Nev. 798 (1994); *Grand Hotel*
13 *Gift Shop v. Granite State Ins. Co.*, 108 Nev. 811, 839 (1992); *Nationwide Mutual Ins. Co. v.*
14 *Moya*, 108 Nev. 578 (1992). An insurance contract that is valid, enforceable, and unambiguous
15 must be construed and enforced as it is plainly written. *See Farmers Ins. Exchange v. Young*, 108
16 Nev. 328 (1992).

17 18 **III. The parties entered into a valid and enforceable contract**

19 Everest argues that under the express terms of the Hacienda Park policy, it is entitled to
20 retain the \$277,000 that Crestdale paid as an advance premium. Crestdale does not dispute that the
21 Hacienda Park policy unambiguously provides for Everest to retain the advanced premium.
22 Instead, Crestdale counters that the policy fails for lack of consideration, contending that (1) a
23 valid insurance contract requires the insurer to actually undertake the contemplated risk, and (2)
24 that because homes were not constructed in Hacienda Park, Everest did not undertake the
25 contemplated risk. This Court finds that actual risk did attach to the policy, and thus, that a valid
26 and enforceable insurance contract formed.

1 Crestdale cites several cases for the proposition that insurance policies are not binding until
2 risk attaches. Everest does not dispute this black letter proposition. Instead, Everest argues that the
3 risk attached to the Hacienda Park policy and that Crestdale's cited authority does not indicate
4 otherwise. The Court agrees.

5 First, Crestdale relies on *Tarleton v. De Veuve*, 113 F.2d 290 (9th Cir. 1940), contending
6 that the obligation to pay a premium does not attach until the risk has attached. In *Tarleton*, the
7 insurer issued and delivered a policy to an insurance broker. Confusion ensued regarding the
8 payment of premium. Prior to payment, a fire destroyed the property covered by the policy and the
9 insurer attempted to rely on the non-payment to escape liability. The court held for the insured,
10 noting that the payment of premium was not required for the policy to be effective. Rather, both
11 the risk and obligation to pay the premium attached to the policy when it was delivered to the
12 broker. Accordingly, *Tarleton* instructs that an insurance contract becomes binding upon delivery.
13 In the present case, there is no dispute that the Hacienda Park policy was delivered. Thus, *Tarleton*
14 weakens Crestdale's position.

15 Crestdale also cites to *Autumn Ridge, L.P. v. Accordia of Va. Ins. Agency, Inc.*, 613 S.E. 2d
16 435 (Va. 2005). In *Autumn Ridge*, twelve limited partnerships brought claims against an insurance
17 agency for negligence and breach of contract for failure to include them as named insureds on a
18 policy. The partnerships paid the agency the policy premiums, but the agency failed to procure the
19 coverage. The court held that "risk never attached as to each of the...partnerships because they
20 were not included as named insureds on the builder's risk insurance policy." *Id.* at 439. Thus, the
21 court found that failing to name the partnerships as insureds was tantamount to depriving them of
22 what they bargained for—a binding contract for insurance coverage—and consequently, that the
23 partnerships were entitled to a return of premiums paid. In contrast, Crestdale was a named insured
24 on the Hacienda Park policy, which bound Everest to provide coverage from April 20, 2004, until
25 Crestdale cancelled it April 19, 2006. Thus, the holding in *Autumn Ridge* is inapplicable.

26 Finally, Crestdale cites *In Re Texas. Ass'n of School boards*, for the proposition that "the

1 foundation of insurance is... risk distribution, and premiums are a function of calculated risk.”
2 169 S.W. 3d 653 (Tex. 2005). However, the Texas Supreme Court’s holding actually cuts against
3 Crestdale’s position, stating that in regard to insurance contracts, “the consideration to be valued is
4 the undertaking of the risk that insured losses *might* occur.” *Id* at 659 (emphasis added). While
5 Everest’s exposure to the risk of liability was reduced by Crestdale’s failure to build and eventual
6 conveyance of the property, this does not mean that risk never attached to the policy. Instead, the
7 policy was in effect for two years before Crestdale sold the property. During that time Everest
8 remained contractually obligated to anticipate risks resulting from the fact that Crestdale could
9 have begun construction at any time, requiring Everest to calculate its business endeavors
10 accordingly. Thus, while the probability of actual loss was reduced by Crestdale’s actions, the
11 policy is not invalid for want of consideration. *See* Restatement (Second) of Contracts § 72 (1981)
12 (“any performance which is bargained for is consideration”). Accordingly, the Hacienda Park
13 policy is a valid contract between the parties, and it is unambiguous with respect to Everest’s
14 entitlement to retain the \$277,000. Moreover, because there is an express written contract, a cause
15 of action for unjust enrichment does not exist under Nevada law. *Lease Partners Corp. v. Robert*
16 *L. Brook Trust*, 113 Nev. 747, 756 (1997).

17 18 **IV. The implied covenant of good faith and fair dealing**

19 Relying on *Guaranty National Insurance Co. v. Potter*, 223 Nev. 199, 206 (1996),
20 Crestdale argues that Nevada law would recognize a cause of action for the breach of implied
21 covenant of good faith and fair dealing with respect to premium disputes. However, *Guaranty*
22 *National* does not support this position. *See id.* The policy at issue in *Guaranty National* required
23 the insureds to submit to independent medical examinations and contained an express promise to
24 pay for the exams. The insurer refused to pay a portion of the cost of the testing and the providing
25 doctor sought to recover the balance from the insureds. The court held that a cause of action for
26 breach of the covenant of good faith and fair dealing existed with respect to the insurer’s failure to

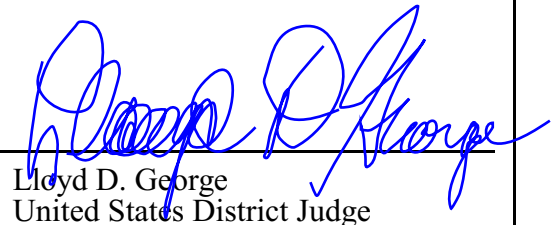
1 pay all of the costs associated with the exams, and noted that while Nevada law generally
2 “addressed an insurer’s breach of implied covenant of good faith and fair dealing as the
3 unreasonable denial or delay in payment of a valid claim,” the tort of bad faith was not expressly
4 limited to such cases. *Id.* This reasoning does not sufficiently support the proposition that Nevada
5 courts would also recognize a cause of action for bad faith with respect to the payment or
6 withholding of insurance premiums. *Cf. Jonathan Neil & Assoc. Inc. v. Jones*, 94 P.3d 1055 (Cal.
7 2004) (holding that in disputes between the insured and the insurer over premiums, the cause of
8 action for breach of the implied covenant of good faith is not necessary to protect the insured’s
9 interest). Therefore, Crestdale has not demonstrated the existence of a cause of action for the
10 breach of the implied covenant of good faith and fair dealing with respect to the payment or
11 withholding of insurance premiums.

12 Accordingly,

13 THE COURT **ORDERS** that Everest Indemnity Insurance Company’s Motion for Partial
14 Summary Judgment (#20) is GRANTED.

15 THE COURT FURTHER **ORDERS** that Crestdale Associates’ Counter-motion for Partial
16 Summary Judgment (#34) is DENIED.

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18 DATED this 29 day of July, 2011.

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21 Lloyd D. George
22 United States District Judge
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